



REPUBLIC OF KENYA

AT THE HIGH COURT OF KENYA IN BUNGOMA

CRIMINAL APPEAL 147 OF 2018

KENNEDY KONES.....APPELLANT

VERSUS

REPUBLIC.....RESPONDENT

[An appeal from the judgment in original Sirisia Cri. (S.O) Case No 4/2018 delivered on 8.9.2014 by Hon C.M. Wattimah - SRM]

JUDGMENT

The appellant Kennedy Kones was charged with the offence of defilement of a child(girl) contrary to section 8(1) as read with sub-section 2 of Sexual Offences Act No. 3 of 2006. The particulars of the charge were that on the 6th day of January,2018 at around 0900 hrs at [particulars withheld] Village, Namubila location Bungoma West Sub-County within Bungoma County he intentionally and unlawfully caused his penis to penetrate the vagina of MA a girl aged 9 years.

He also faced an alternative charge of committing indecent act with a child contrary to section 11 of the sexual offences Act No. 3 of 2006 based the same facts. The particulars of the alternative charge were that on the 6th day of January,2018 at around 0900 hrs at [particulars withheld] Village, Namubila location Bungoma West Sub-County within Bungoma County the appellant intentionally and unlawfully touched the vagina of MA a child aged 9 years.

The evidence on record is that Pw1 EAE testified that on 6/1/2018 she was at home cooking Mandazi, her daughter M who is 9 years old had gone to church but she did not come back. She produced baptismal dedication as PMFI-1. She testified that she came back on Monday 10/1/2018 and she said she had gone to her grandmother's place and that she was not feeling well.

She recalled that on 12th January her daughter informed her that she was unwell and urinating blood. She took her to Sirisia Hospital for treatment where she was informed that her daughter had been defiled. When then child was asked who defiled her she said it was Kennedy Pw1 produced treatment book as PMFI-2.

She testified that the child's father was called and took her to Sirisia Police Station and they were referred to Bungoma District Hospital. She produced referral notes as PMFI-3 and treatment notes form Bungoma District Hospital as PMFI-4.She testified that were admitted at Bungoma District Hospital for 3 days and P3 form was produced as

PExh.6. She testified that the suspect was arrested on 12/1/2018 and she knew the accused as her neighbor.

Pw2, MA testified that she is 9 years old and in Standard 4. She recalled that on 6/1/2018 while going to church she met Kennedy who is their neighbor and he took her to his mother's house and laid her down and removed her clothes. She testified that he took her legs and put them between his legs and he removed his thing that he uses to urinate and defiled her. She testified that he closed her mouth with his hand when she tried to raise an alarm and when finished he threatened her with a panga that he will cut her with a panga if she told anyone. She testified that she then left to church but she could not seat in church due to pain. She testified that she went to her grandmother's place but she did not tell her what happened and she stayed there for two days. She recalled that she went back home on Monday but she did not tell her mother and when she went to school she could not sit in school and she became very ill. She recalled that she was taken to hospital and she informed the doctor that the accused had defiled her and she was taken to Sirisia Police station and she was also referred to Bungoma District Hospital.

Pw3 JB testified that on 6/1/2018 while at SDA church her granddaughter M came and took Leso and she said she was not feeling well. She stated that after church they went home and they stayed together she refused to back home. She testified that she gave her medicine and after two days her father called and said that she should go home. She testified that Patrick who father to Pw2 later on called and informed her that PW2 was ill and she had been defiled.

Pw4 Lilian Akwenyi a clinical officer at Sirisia Sub-County testified that she attended to the victim and produced P3 form.She testified that she has referral form to Bungoma District Hospital and age assessment form and out patient notes for the minor.

She testified that she attended to the patient on 12/1/2018 and she was in company of her mother. She testified that she treated the patient who informed her that Baba Johny had defiled her. She testified that she examined minor private parts that had a foul smell, labia minera and majora were inflamed and hymen ruptured she took her for lab test which showed she had bacterial infection and Malaria was Positive.

Pw5 testified that CPL Chesaria Bruno testified that on 12/1/2018 he received allegations of defilement of minor and she was in the company of her mother. He testified that the clinical officer had examined the minor and found that she had been defiled. He testified that he issued a P3 Form and the minor informed him that accused was at his mother's place. He testified that the accused was arrested and charged.

When the accused was put on his defence he testified and gave sworn evidence calling 2 witnesses. Dw1 Kennedy Kones testified that on 6/1/2018 he was at home in the farm and he was preparing his farm and he does not know what happened. He testified that he was in the farm upto 11.00 am and he went home and after lunch he went to take care of his cattle. He testified that on 12/1/2018 his mother went to their neighbor home and found a sick child who was the complainant. He testified that advised her neighbor to take the minor to the hospital. He testified that his mother came back and later on at around 12.00 midnight someone knocked their door and he was arrested with allegation of defiling the child.

Dw2 Josephine Talaban Rsato testified that on 6/12//2018 he was at his house. He recalled that he was with DW1's children who were helping him remove cow dung from the farm. He recalled that on 12/1/2018 in the morning he went to his neighbor's house and the wife was cooking and she had a child groaning in the house. He recalled that he was told that the child was unwell and he advised them to take her to the hospital. He testified that later on that night, the accused wife came to his house and informed him that accused had been arrested for defiling the complainant.

Dw3 JK, a pupil in standard 2 testified that on 6/1/2018 while carrying cow dung with DC G and A up to 11.00am and they stayed at their grandmother's house while their father was at his home digging the farm. He testified that the following saw the complainant carrying water and they proceeded to church.

After full hearing it is upon the above evidence that the trial court found the accused guilty and sentenced him to life imprisonment. Having been dissatisfied with the judgment the Appellant has appealed to this court on the following grounds:

- i. That the learned magistrate erred in law and facts when he relied on hearsay.*
- ii. That the learned magistrate erred in law when failed to cross examine the appellant*
- iii. That the witnesses contradicted each other as to the correct name of the appellant*
- iv. That the magistrate contradicted herself as to the charge that faced the accused.*
- v. That the sentence meted against the appellant was excessive given the circumstance*
- vi. That the appellant was not properly identified and it is not possible for 9 years girl to walk and go to school after defilement.*

He filed his written submissions in which he submitted that he was irreconcilable contradictions between the prosecution witnesses testimonies. He submitted that Pw1 and Pw2 was taken to the hospital on 11th January 2018 while Pw4 the clinical officer stated that she attended to Pw2 on 12th January 2018. He submitted that Pw2 submitted that she did not bleed after the incident while Pw1 stated that she was bleeding. He submitted that the foregoing contradictions and inconsistencies render the evidence of the prosecution so unreliable and devoid.

He submitted on the medical report by clinical officer that the C.O. can up with the finding of sexual assault in order to support allegations against the appellant. He submitted that the appellant gave his evidence but the trial court did not evaluate his evidence. He submitted that offence of defilement was not proved beyond reasonable doubt and prayed that this appeal to be allowed.

The prosecution opposed the appeal through Prosecuting Counsel Nyakibia. She submitted that on age that age assessment form was produced and showed that the complainant was 9 years old. She submitted on penetration that the clinical officer gave evidence that which supported the penetration. She submitted that appellant raised an alibi defence and trial court considered the same. He submitted that the sentence was proper.

This being the Appellant's first appeal, the role of this appellate Court of first instance is well settled. It was held in the case of **Okeno VS R 1972 EA** and further in the Court of Appeal case of **Mark Oiruri Mose Vs. R (2013)eKLR** that this Court is duty bound to revisit the evidence tendered before the trial court afresh, evaluate it, analyze it and come to its own independent conclusion on the matter but always bearing in mind that the trial court had the advantage of observing the demeanor of the witnesses and hearing them give evidence and give allowance for that.

This Court in determining this appeal is to satisfy itself that the ingredients of the offence of defilement, or alternatively those of the offence of committing an indecent act with a child, were proved and as so required in law; beyond any reasonable doubt.

The key ingredients of the offence of defilement include proof of the age of the complainant, proof of penetration and proof that the Appellant was the perpetrator of the offence. On looking at those aspects in this judgment, this Court shall consider each of them singly.

On the age of the complainant, the prosecution produced a baptismal dedication card as PMFI-1 that showed PW1 was born on 3/8/2008.

The prosecution also age assessment Form as PMFI-7(Exhibit 7) through the clinical officer that indicated that the complainant was 9 years old.

The Sexual Offences Act promulgated some rules towards the achievement of its objectives. Those rules came to be known as "**The Sexual Offence Act (Rules of Court) 2014**" which came into force on 11/07/2014 under Legal Notice No. 101. Under **Rule 4 thereof**, the age of the complainant may be determined by way of a Birth Certificate, any school documents, a Baptismal Card or any other similar document. It is therefore the finding of this Court that on the foregone evidence, the complainant was a minor at the alleged time of commission of the offence.

On the issue of penetration of the Complainant's private parts, Section 2 of the Sexual Offences Act defines penetration as:

'the partial or complete insertion of the genital organs of a person into the genital organ of another person.'

This position was fortified in the case of **Mark Oiruri Mose vs R (2013)eKLR** when the Court of Appeal stated thus:

'...Many times the attacker does not fully complete the sexual act during commission of the offence. That is the main reason why the law does not require that evidence of spermatozoa be availed. So long as there is penetration whether only on the surface, the ingredient of the offence is demonstrated, and penetration need not be deep inside the girl's organ....' (emphasis mine).

In demonstrating this particular ingredient of the offence, Pw4 was the Clinical Officer who filled in the P3 Form. He was the one who examined the complainant. He recorded the following notes as appearing in P3 Form:-

"Hymen was ruptured,"

She also testified that her private parts had a foul smell, labia minora and majora were inflamed meaning that there was injury. She also testified that she carried out lab test and results showed that the complainant had bacteria infection. The complainant's penetration can be proved by evidence of the complainant and/or confirmed by the evidence of in detail how the appellant took her to the house, removed her inner pants and penetrated his penis on her vagina of the complainant. She complained of pain and he threatened her not to tell anybody.

On whether the Appellant was the perpetrator, as the Appellant has denied committing the alleged offence, that calls for an in-depth examination of the circumstances so as to settle the issue as to whether the Appellant was rightly identified as the perpetrator of the offence.

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Pw1 testified on 6/1/2018 while going to church she met Kennedy who is their neighbor and he took her to his mother's house and laid her down and removed her clothes. She testified that he took her legs and put them between his legs and he removed his thing that he uses to urinate and defiled her.

Also Pw1 informed the clinical officer that the accused defiled her and he was their neighbor and gave the name of accused. In **Lesarau – Vs- Rep, 1988 KLR 783**, Court emphasized that where identification is based on Visual identification by reason of long acquaintance, there is no better mode of identification than by name.

I am satisfied that the appellant was positively identified because the complainant stated he was their neighbor at home. The identification was free from error. The appellant has prayed for leniency on the sentence. Sentencing is discretion of the court and the high court can only interfere if the sentence is illegal or was arrived at by applying wrong principles of law. From the evidence on record it emerged that the complainant was a minor aged 9 years old.

On sentence, although the appellant was a first offender, the complainant was only 9 years old. I hereby set aside the sentence of Life imprisonment imposed and substitute thereof with imprisonment for Twenty five years from date of Judgment on 18.11.2018.

Dated and Delivered at BUNGOMA this 12th day of March, 2020.

S.N.RIECHI

JUDGE